[fol. 89] No. 27,864

HARRY M. AVANCE, Plaintiff-Appellee,

vs.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Defendant-Appellant

Appeal from theAppellate Court, Fourth District. There Heard on Appeal from Circuit Court of St. Clair County.

Paragraphs 2, 3 and 4 Page 20 and Paragraphs 1, 2 and 3 Page 21 of STATEMENT, BRIEF AND ARGUMENT OF APPELLANT.

The opinion of the Appellate Court correctly states defendant's contention as to these five cars, but bases its determination of the commerce question upon three other cars which were attached to the engine at the time of the accident, viz., Mo. Pac. 3205 (the correct number is 32052), PRR 50409 and PTX 4741. As to these cars the opinion states they "were brought in from Illinois on train 93 by conductor Rehm."

The conclusion so stated has no support in the evidence and, to demonstrate this, we must necessarily refer to the record.

[fol. 90] The matter is of such consequence that in the abstract (page 34A) we have completely set out the testimony on the point. We suggest the only conclusion which can be drawn from the testimony of conductor Maddock is that the three cars were brought into the Bismarck yard by the M. & I. Railroad train No. 93, which came from Ste. Genevieve, Missouri. We ask the Court to examine abstract pages 33, 34 and 34A and record pages 115-117.

But assuming train 93 came into Ste. Genevieve, Missouri from Illinois, these three cars have no interstate character by reason thereof.

Conductor Maddock did not testify these cars came from Illinois. He did not ride train 93. There is nothing on the wheel report (Ex. 8, Abs. 91) which indicates that any one of the three cars came from Illinois. Assuming train 93 started in Illinois and entered Missouri at Ste. Genevieve, there is no evidence the three cars came in with the train from Illinois. Car M. P. 32052 was loaded with lime (see

Ex. 8, Abs. 91) when *I*t came into Bismarck, but had been unloaded when conductor Maddock handled it (Abs. 33).

There are lime quarries and cement plants at Ste. Genevieve, Missouri. Ste. Genevieve is over thirty miles from Bismarck, Missouri. There are several other stations en route from Ste. Genevieve to Bismarck.

[fol. 91] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court,ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of paragraphs 2, 3 and 4, page 20, and paragraphs 1, 2 and 3, page 21, of brief of appellant filed in this office on the 22d day of February A. D. 1944, in a certain cause entitled in this Court

No. 27864

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a corporation, Appellant,

vs.

HARRY M. AVANCE, Appellee

Appeal from Appellate Court Fourth District

Witness: my hand and seal of said Supreme Court, in Springfield, in said State, this 23d day of August A. D. 1944.
Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 92] No. 27864

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a corporation, Appellant,

vs.

HARRY M. AVANCE, Appellee

[fol. 93] Mr. Johnson: I object to that.
The Court: Objections sustained.

To which ruling of the Court counsel for the plaintiff then and there excepted.

Q. Is every other car on there except the PTX 4741, empty tank?
A. It shows ten on here.
Q. How many did you have leaving there?
A. I think the wheel report shows eleven.
Q. Do you remember you had eleven?
A. No, I don't. All I have to go by is that.

Mr. McDonald: We will offer Plaintiff's Exhibit "6" in evidence. It is one of your records. May the record show that Exhibit "6" was given us by counsel for the defendant.
Mr. Whitnel: All papers you have were furnished voluntarily by counsel.
Mr. Listeman: We renew our objection to all of these exhibits.
The Court: Objection overruled. They may be admitted.

To which ruling of the court counsel for the defendant then and there excepted.

Q. Have you a book in your pocket that you make up yourself?
A. No.
Q. You had it yesterday.
A. I have a book in which I keep my time and crew.
Q. Does that book show the cars you took out of Bismarck?
A. No, sir.
Q. Have you any book at all that shows the cars you took out of Bismarck?
A. No. We don't have to have.
Q. Do you have?
A. No, sir.

Q. Now I think you possibly might have to explain this to every one. It says "Destination Junction and Routing". With respect to PTX 4741, it has "X-491". What does that indicate?

[fol. 94] A. That is the station number.

Q. What station number is it?

A. Texarkana.

Q. What State?

A. Arkansas.

Q. So that that car was going to Arkansas, is that right?

A. That's right. That is on the wheel report and I put it down there.

Q. And what is the last station number on this trip, that is within the State of Missouri, if the stations go by number?

A. That I run to?

Q. No. When you start out of St. Louis what is that station number?

A. X-1.

Q. And the last town on the southern border of the State of Missouri, when you cross into Arkansas, what is that station number?

A. X-180. Neelyville, Missouri.

Q. So that any destination shown here that has a number higher than X-180 means it has gone beyond the State of Missouri?

A. Yes, sir.

Q. It would be in Arkansas or points south?

A. Yes.

Q. What is Station X-344?

A. Little Rock.

Q. Arkansas?

A. Yes. That is a car I picked up.

Q. And which cars are the eleven cars you left town with, the leading cars on the wheel report?

A. Yes, sir, down to here.

Q. By that you mean on page two of this exhibit, starting at the top with Missouri Pacific——

A. Page one it is.

Q. You are right. The first eleven cars on page one or the first twelve cars, which is it?

A. It will be twelve. That counts the caboose.

[fol. 95] Q. The first twelve cars on the top of page one of the exhibit are the cars you left Bismarck with?

A. Yes.

Q. Where is X-491, what station is that?
A. Texarkana.
Q. So that in leaving Bismarck this day, according to this wheel report, among the eleven cars that you had two of them were going to Texarkana, Texas or Arkansas?
A. Yes. X-344 and X-491.
Q. And this empty tank car was one of the cars involved in this particular movement at the time?

Mr. Johnson: I object, repetition.
Mr. Listeman: He wouldn't know about it.
The Court: If he knows he may answer.

To which ruling of the court counsel for the defendant then and there excepted.

Q. I will withdraw it. Calling your attention to Plaintiff's Exhibit "8" I will ask you if you can find one of the nine cars involved at the time, being Missouri Pacific 32052, empty, on this particular exhibit?
A. Yes, sir. 32052.
Q. Missouri Pacific 32052?
A. Yes, sir.
Q. And what is this a report of that was furnished us by counsel for defendant also?
A. This is the list that come in over the M. & I. from Ste. Genevieve and around in there.
Q. In other words, this car with other cars was brought in to the Missouri Pacific yard at Bismarck by train number ninety-three?
A. Missouri and Illinois Division. M. & I.
Q. Brought in by train ninety-three?
A. Yes.
Q. What is train number ninety-three?
A. That is the M. & I. train that comes in from Ste. Genevieve.
Q. It comes in from the State of Illinois?
[fol. 96] A. From Ste. Genevieve, Missouri.
Q. What conductor brought that in?
A. Rehm.
Q. Does this report show when the car 32052 was brought into Bismarck?
A. There is no date on it.
Q. Can you tell from that record when the car came in?
A. No. It is bound to come in that day.

Q. So that you would say that car came into Bismarck that day?

A. Yes, sir. Came in as part of train ninety-three.

Mr. McDonald: We will offer this exhibit "8" in evidence.

Mr. Listeman: The same objection.

The Court: It may be admitted.

To which ruling of the court counsel for the defendant then and there excepted.

Q. Calling your attention to Plaintiff's Exhibit "9", what is that a record of?

A. That is a record of the cars we delivered to the M. & I. Railroad.

Q. On the 17th of January 1942?

A. There is no date on here.

Q. That is a record we got from counsel for the defendant with reference to the cars delivered to the M. & I.

A. That is the cars we switched out of the yard and out of the Belmont Branch train, and delivered them to the M. & I.

Q. The M. & I. is the Missouri and Illinois Railroad?

A. Yes, sir.

Mr. McDonald: We offer in evidence Plaintiff's Exhibit "9".

Mr. Listeman: The same objection all the way through.

The Court: It may be admitted.

To which ruling of the court counsel for the defendant then and there excepted.

Q. Calling your attention to Plaintiff's Exhibit "10", consisting of seven tabs, with listings of cars. They were all furnished to us by the counsel for the Railroad Company, the cars in the yard that day. Will you examine them and tell us about the first exhibit. The cars in that train are [fol. 97] the cars listed on the first exhibit. How did the cars come into the yard, do you know, in a train or otherwise?

A. Sure they come in a train. Number eleven track.

Q. That shows the cars in the first section at the top that were on number eleven track?

A. Yes, sir and I think this is my train in there. Part of it is my train in there.

Q. And the second section?
A. And part of it has the branch local train in there.
Q. And where it says the next heading what is that?
A. New Ozark.
Q. What is that?
A. That is the New Ozark flooring mill.
Q. Does that show the cars on that track?
A. One car listed off the Ozark Flooring Mill. A carload of flooring for St. Louis.
Q. Number ten, what does that show?
A. Track number ten.
Q. What does it show?
A. That is track number ten. It shows a bunch of cars that come in there and one of them we had to place on the New Ozark for flooring, where we took the one out.
Q. The next heading.
A. You don't want this.
Q. I am not asking about each one. That would take too long. What about number nine? Is this number nine?
A. Yes, sir.
Q. Let me take this. This then shows the cars on track——

The Court: What exhibit is this?
Mr. McDonald: Exhibit "10".
The Court: Always refer to the exhibit.

Q. Exhibit "10" shows the cars that were on various tracks in the yard?
A. Yes, sir, nine, ten and eleven and the New Ozark.
Q. And that shows as of January 17, 1942?
A. Yes. That is part of our work.
[fol. 98] Q. The second page of Exhibit "10". It shows cars that came into Bismarck with what conductor?
A. Conductor Stall.
Q. Train number what?
A. First 63.
Q. Where did that train come from?
A. St. Louis, Missouri.
Q. That shows the cars that train brought in on January 16, 1942?
A. That is part of them. That is a few they set out as they went by Bismarck.
Q. The third sheet of Exhibit "10", it shows cars brought in by what train number?

A. 368.

Q. The conductor.

A. Shore. They went out. They didn't come in.

Q. It shows cars going out?

A. Yes. All St. Louis cars off number one track.

Q. St. Louis, Missouri?

A. Yes. 368 come from Poplar Bluff and picked up all these cars.

Q. And 368 came from Poplar Bluff with cars in the train and on arrival at Bismarck picked up these cars? 368 picked up these cars and made these cars a part of the then existing train?

A. Into St. Louis, yes, sir.

Q. The next tab of Plaintiff's Exhibit "10" is what?

A. That is two cars of Company coal set out at Bismarck.

Q. Who set it out?

A. W. A. Shore, from the first train 368.

Q. Where did that train start?

A. Poplar Bluff.

Q. And ends where?

A. St. Louis.

Q. Missouri?

A. Yes, sir.

Q. Does that show the date the cars were set out by the train?

A. No, sir.

[fol. 99] Q. The next tab of Plaintiff's Exhibit "10", what does that show?

A. That shows 92s train M. & I. going out of there. The cars had been delivered to it, going to Mosher.

Q. It shows the cars that 92 took out of Bismarck?

A. Yes. They had been delivered to them up on their tracks. This is the M. & I. train 92.

Q. Number ninety-two on January 17, 1942 shown by Plaintiff's Exhibit "10" is the M. & I. train?

A. Part of it.

Q. The next tab shows what?

A. It shows three cars of Company coal.

Q. Brought in or left there with what train?

A. Come in on third 368 from Poplar Bluff.

Q. That train stopped at Bismarck and set out those cars?

A. Yes.

Q. And the last tab of Exhibit "10", that is one of the seven, shows what?

A. Well, it shows three cars on number eleven track and one car on the house track.

Q. Does it show how these cars got to Bismarck?

A. No. These were going out of Bismarck on train 56, out of Bismarck into St. Louis. Train 56, the 17th and the train was on number eleven track and X-1 was on the house track.

Mr. McDonald: We offer Plaintiff's Exhibit "10", consisting of seven tabs, into evidence.

Mr. Listeman: Same objection.

The Court: They may be admitted.

To which ruling of the court counsel for the defendant then and there excepted.

Mr. McDonald: We have one more record that counsel has given us. Counsel, might we agree or stipulate that you have given plaintiff's counsel a report of cars on hand on January 16, 1942, as they stood in the yard at ten fifty A. M., by your record, and also a report of cars on hand as they stood on your tracks at Bismarck.

[fol. 100] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of pages 115 to 121, inclusive, of the transcript of record filed in this office on the 16th day of April A. D. 1943, in a certain cause entitled in this Court

No. 27864

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

HARRY M. AVANCE, Appellee

Appeal from Appellate Court, Fourth District

Witness: my hand and seal of said Supreme Court, in Springfield, in said State, this 23d day of August A. D. 1944.

Edward F. Cullinane, Clerk pro tempore. Seal.)

ol. 101] No. 27864

HARRY M. AVANCE, Plaintiff-Appellee,

vs.

UY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a Corporation, Defendant-Appellant

Appeal from the Appellate Court, Fourth District

ıere Heard on Appeal from Circuit Court of St. Clair County.

onorable Maurice V. Joyce, Judge Presiding.

Lines 6, 7, 8 and 9, Page 22 of Statement, Brief and Argument of Appellee

Their precise origin or destination does not appear but does appear that train No. 93, upon which they arrived, ıme into St. Genevieve from the state of Illinois (34, 34A).

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fol. 102] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of lines 6, 7, 8 and 9, page 22, of brief of appellee filed in this office on the 13th day of March A. D. 1944, in a certain cause entitled in this Court No. 27864, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, Appellant, vs. Harry M. Avance, Appellee; Appeal from Appellate Court, Fourth District.

Witness my hand and seal of said Supreme Court, in Springfield, in said State, this 23d day of August A. D. 1944.

Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 103] [Stamp:] Received Sep. 21, 1944. Office of the Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 324

HARRY M. AVANCE, Petitioner,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

ACKNOWLEDGMENT OF SERVICE

Receipt is acknowledged of a copy of Motion to Include in and print as a Part of the Transcript of the Record in This Cause Portions of the Record of the Supreme Court of Illinois and Excerpts of Briefs of the Parties in Said Court of Appellee on this the 18th day of September, 1944, at East St. Louis, Illinois.

William H. DeParcq. By Jos. B. McGlynn, Attorneys for Petitioner-Appellant.

STATE OF ILLINOIS,
County of St. Clair, ss:

Josiah Whitnel, first being duly sworn on his oath, states he has this day deposited in the United States mail, full postage prepaid and properly addressed to William H. DeParcq, Attorney, 2535 Rand Tower, Minneapolis, Minnesota, one copy of Motion to Include in and Print as a Part of the Transcript of the Record in This Cause Portions of the Record of the Supreme Court of Illinois and Excerpts of Briefs of the Parties in Said Court of Appellee in the cause above entitled.

Dated in East St. Louis, Illinois, this 18th day of September, 1944.

Josiah Whitnel.

Subscribed and sworn to before me this 18th day of September, 1944. Rose Mary Neal, Notary Public. (Seal.)